**PONTIAN BAS BERHAD**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CRIMINAL APPEAL NO. 100 OF 1985]
25 JULY 1987

***CRIMINAL LAW AND PROCEDURE:*** *Appeal against order of Magistrate - Manager of appellant company committed to prison for default of payments of arrears of EPF contributions - Power to order a term of imprisonment - When exercisable - Order of committal - Whether should be set aside.*

***PROVIDENT FUND:*** *Contributions - Failure by employer to pay to EPF Board - EPF Board applied for summons - Manager of company appeared in Court - Order of Court to pay arrears - Section 16A(4) Employees Provident Fund Act 1951 - Default of payment - Whether recoverable as a fine or constitutes a civil debt - Term of imprisonment in default of payment of arrears - Whether could be ordered - Scope of s. 283 Criminal Procedure Code.*

This was an appeal against an order of a Magistrate's Court which committed the manager of the appellant company to a term of imprisonment (10 months) for default of payment of the arrears of contributions owed by it to the EPF Board after giving an undertaking to do so by a certificate.

The learned Magistrate held that she had acted -

(a) under s. 16A(4) of the Employees Provident Fund Act in ordering the manager to pay the arrears of the contributions;

(b) under the specific provision of s. 283(i)(b)(1) of the Criminal Procedure Code (FMS Cap. 6) in allowing him time to pay; and

(c) under the general provisions of s. 283 of the Code in committing the manager to prison in default of payment of the arrears.

**Held:**

**[1]** The provisions of s. 16A(4) of the Employees Provident Fund Act are mandatory and they impose an obligation on the part of the Court to order the employer to pay the arrears upon conviction after certification by the Board's accountant of the arrears owing prior to the date of the conviction. The provisions also stipulate that the arrears are recoverable in the way that a fine is recoverable.

**[2]** The specific provisions of s. 283(i)(b)(4) and of s. 283(i)(c) of the Criminal Procedure Code prescribe imprisonment in case of default of payment of a fine only when the offender has been in default of payment of a fine *per se*, i.e. a fine imposed as punishment for a particular offence, and then lay down a scale for the maximum term that can be imposed depending on whether the particular offence is originally punishable with imprisonment or not.

**[3]** The specific provisions of s. 283(i)(b)(4) and of s. 283(i)(c) of the Code cannot apply to arrears of contributions upon certification because they were not fines as such.

**[4]** The power to order a term of imprisonment in default of payment of fine is exercisable only when there has been a failure on the part of the offender to pay a fine imposed for a specific offence. In this case, the arrears of contributions have not been imposed as a fine for a specific offence nor can they be construed as having been so imposed.

**[5]** Where the arrears of contributions by their very nature constitute a civil debt and were not ordered to be paid by way of a penalty "... it is not to be treated as a fine in default of which a term of imprisonment may be imposed." (*PP v. Lai Sien Kon* per Ajaib Singh J)

*[Appeal allowed. Order of committal set aside.]*

**Cases referred to:**
*Public Prosecutor v. Lai Sien Kon [1978] 2 MLJ 110*

**Legislation referred to:**
Criminal Procedure Code (FMS Cap 6), ss. 283, 283(i)(b)(1), (2), (3), (4), (5), 283(i)(c)
Employees Provident Fund Act 1951, ss. 16A(1)(c), 16A(4)
Entertainment Duty Rules 1953, r. 8(3)
Prevention of Corruption Act 1961, ss. 4(b), 13

*For the appellant - P. Nainan; M/s. Philip Nainan & Co.*
*For the respondent - Sauffee Afandi bin Mohamad, DPP*

**JUDGMENT**

**LC Vohrah J:**

This is an appeal against an order of the Magistrate's Court committing the manager of the appellant company to a term of imprisonment for his failure to pay arrears of contributions owed by it to the Employees Provident Fund Board after undertaking to do so by a certain date.

The material facts are not in dispute. The appellant company was on 15 October 1984 charged under s. 16A(1)(c) of the Employees Provident Fund Act 1951 on 24 counts for failing as an employer to remit contributions in respect of 4 employees. Its Manager one A. Mutalib bin Selamat who was present on that day pleaded guilty to all the charges and a fine of RM180 was imposed for each charge. The total amount of the fines in the sum of RM4,320 was paid. The learned Magistrate upon the application by the prosecuting officer also made an order for the appellant-company to pay the arrears of contributions due to the Board. The arrears duly certified under the hand of the Accountant to the Board amounted to RM28,325. The manager applied for time to pay this sum and the learned Magistrate allowed him two months, i.e. up to 15 December 1984, to do so. However on 1 December 1984 a receiving order was made against the appellant-company. The manager failed or was unable to pay the arrears and an application was made by the prosecution to have him committed to prison in default of payment. He was accordingly asked by the Court to show cause why he should not be committed. On 23 April 1985 he appeared in Court and explained that he had written to the Board asking for the arrears to be settled after the statutory meetings of the creditors and contributories with the Official Receiver. The hearing of the notice to show cause was then adjourned to 22 May 1985 on which date it was further adjourned to 3 June 1985 when submissions were made by the prosecuting officer. There were further adjournments and on the last adjourned date, 29 June 1985, the submissions of Counsel for the appellant-company and the reply of the prosecuting officer were heard. Finally on 18 October 1986 the learned Magistrate gave the order committing the manager to 10 months' imprisonment for default of payment of the arrears.

In her grounds of decision the learned Magistrate states that she acted-

(a) Under s. 16A(4) of the Employees Provident Fund Act in ordering the manager to pay the arrears of the contributions;

(b) under the specific provisions of s. 283(i)(b)(1) of the Criminal Procedure Code (FMS Cap. 6) in allowing him time to pay; and

(c) under the general provisions of s. 283 of the Code in committing the manager to prison in default of payment of the arrears.

I shall now deal with the statutory provisions under which the learned Magistrate purported to have acted.

Section 16A(4) of the Act reads:

> Upon being found guilty on any offence under paragraph (c) of subsection (1) of s. 16(A) of this Ordinance, the Court before which the employer is found guilty **shall order such employer to pay to the Board the amount of any contributions**, together with any interest credited thereon, due and payable to the Board and certified by the Accountant of the Board to be due from such employer, prior to the date of such founding (*sic*) of guilty and such contributions **shall be recoverable in the same manner as a fine**; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under s. 426 of the Criminal Procedure Code. [Emphasis mine]

It is clear that the provisions of s. 16A(4) are mandatory and they impose an obligation on the part of the Court to order the employer to pay the arrears upon conviction after certification by the Board's accountant of the arrears owing prior to the date of the conviction. The provisions also stipulate that the arrears are recoverable in the way that a fine is recoverable.

The general provisions relating to sentences of fines including the specific manner in which they are recoverable are contained in s. 283 of the Code and they read:

> (i) **Where any fine is imposed under the authority of any law for the time being in force**, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply (that is to say)-
>
> (a) where no sum is expressed to which the fine may extend the amount to which the offender is liable is unlimited, but shall not be excessive;
>
> (b) in every case of an offence in which the offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, do all or any of the following things:
>
> (1) allow time for the payment of the fine;
>
> (2) direct payment of the fine to be made by instalments;
>
> (3) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;
>
> (4) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence:
>
> Provided that where time is not allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued in the first instance unless it appears to the Court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment.

(5) direct that such person be searched and that any money found on him when so searched or which, in the event of his being committed to prison, may be found on him when taken to prison, shall be applied towards the payment of such fine the surplus, if any, being returned to him:

Provided that such money shall not be so applied if the Court is satisfied that the money does not belong to the person on whom it was found or that the loss of the money will be more injurious to him than his imprisonment;

(c) the period for which the Court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale -

(1) if the **offence** is punishable with imprisonment:

| **Where the maximum term of imprisonment-** | **The period shall not exceed-** |
|---|---|
| does not exceed six months... | the maximum term of imprisonment |
| exceeds six months but does not exceed two years... | six months |
| exceeds two years... | one quarter of the maximum term of imprisonment |

(2) if the **offence** is not punishable with imprisonment:

| **Where the fine -** | **The period shall not exceed -** |
|---|---|
| does not exceed twenty-five dollars ... | two months |
| exceeds twenty-five dollars but does not exceed fifty dollars... | four months |
| exceeds fifty dollars... | six months; |

(d) (Omitted).

(e) the imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law;

(f) if, before the expiration of the time of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the time of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate;

(g) the fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if under the sentence the offender be liable to imprisonment for a longer period than six years then at any time previous to the expiration of that period, and the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts.

(ii) A warrant for the levy of a fine may be executed at any place in the Federation, but if it is required to be executed outside the State in which it is issued it shall be endorsed for that purpose by a Judge or by a Magistrate of the First Class having jurisdiction in the State in which it is to be executed. [Emphasis mine]

As I see it, s. 283 of the Code provides, *inter alia*, guidelines to the Court for the imposition of a sentence of fine in the absence of of any express provision relating to such a fine, for the realization or execution of a sentence of fine, and for the maximum period of imprisonment that can be imposed in default of payment of fine depending upon whether the offence for which the fine is imposed is punishable with imprisonment or not. The provisions of

s. 283(i)(b)(1),(2), (3) and (5) read together with those of s. 16A(4) of the Act would therefore give the Court the power to recover arrears of contributions by allowing time for payment of the arrears or by enabling the arrears to be paid by instalments or by issuing a warrant for the levying of the amount of the arrears by distress and sale of any property belonging to the offender or by directing the offender to be searched and any money found on the offender to be applied towards the payment of the arrears. The specific provisions of s. 283(i)(b)(4) and of s. 283(i)(c), in my view, prescribe imprisonment in case of default of payment of a fine only when the offender has been in default of payment of a fine *per se*, i.e. a fine imposed as punishment for a particular offence, and then lay down a scale for the maximum term that can be imposed depending on whether the particular offence is originally punishable with imprisonment or not. These specific provisions cannot apply to arrears to be paid by instalments or by issuing a warrant for the levying of the amount of the arrears power to order a term of imprisonment indefault of payment of fine is exercisable only when there has been a failure on the part of the offender to pay a fine imposed for a specific offence and the arrears of contribution in this case have not been imposed as a fine for a specific offence nor can they be construed as having been so imposed. I find support for this view in the case of *Public Prosecutor v. Lai Sien Kon* [1978] 2 MLJ 110 where Ajaib Singh J stated:

> It must be stressed here that the provisions in s. 283 of the Criminal Procedure Code which provide for terms of imprisonment in default of payment of fines have no application in the recovery of a penalty ordered under s. 13 of the Prevention of Corruption Act. The penalty is to be treated as a fine but only to the extent and for the purpose of its recovery as such and is not to be treated as a fine in default of which a term of imprisonment may be imposed.

In that case the accused pleaded guilty on two charges. The first charge was that he resold 17 cinema tickets which is an offence under r. 8(3) of the Entertainments Duty Rules 1953 and the second charge was that he had corruptly offered a gratification to wit RM29 to a police constable as an inducement for forbearing to do an act in relation to his principal's affairs, namely, refraining from taking action against the accused under the Rules, an offence under s. 4(b) of the Prevention of Corruption Act 1961. On the first charge he was fined RM200, in default one month's imprisonment. On the second charge he was fined RM500, in default four months' imprisonment. In addition he was ordered to pay RM29 by way of penalty to the government of Malaysia, in default one week's imprisonment. The order to pay RM29 to the government was made under s. 13 of the Prevention of Corruption Act whose provisions relating to the recovery of a penalty are similar to those of s. 16(A)4 of the Act with regard to the recovery of arrears of contributions. Section 13 of the Prevention of Corruption Act reads:

> Where a Court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provisions of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the Court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within the time and to the body and in the manner specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the Court, the value of the gratification, and **any such penalty shall be recoverable as a fine**. [Emphasis mine]

I agree with the reasoning of Ajaib Singh J and it must a *fortiori* apply in the instant case where the arrears of contributions by their very nature constitute a civil debt and were not ordered to be paid by way of a penalty. In the result the appeal must be allowed and the order of committal made by the learned Magistrate is accordingly hereby set aside.

Also found at [1987] 2 CLJ 240